90-691

IN THE

Supreme Court of the United States

EAST PRINCE FREDERICK CORPORATION,
Petitioner,

v.

BOARD OF COUNTY COMMISIONERS OF
CALVERT COUNTY, MARYLAND,
Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE DECISION OF THE
COURT OF APPEALS OF MARYLAND
(WILLIAM H. ADKINS, II, Judge)

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QUESTIONS PRESENTED

1) Can the government by legislation pre-empt existing contract rights without making a showing as to necessity or reasonableness?

2) What are the appropriate standards for review when determining whether a legislative action which interferes with a contract is reasonable and necessary?

TABLE OF CONTENTS

Table of Authorities

Constitutional Provisions and Regulations

Grounds of Jurisdiction

This matter was originally heard before the Honorable John Hanson Briscoe in East Prince Frederick Corporation v. Board of County Commissioners of Calvert County, Case No. CA87-295 in the Circuit Court for Calvert County Maryland. The issue of interference with contract and the violation of the United States Constitution was raised in the Complaint. See Appendix at p. A-50. A hearing was held on August 16, 1988 and Judge Briscoe entered an opinion and order in favor of the Plaintiff on November 7, 1988. See Appendix p. A-12. Judge Briscoe's judgment adjudicated all claims in the action in their entirety and the rights and liabilities of all parties to the action.

The Board of County Commissioners of Calvert County, Maryland appealed to the Court of Special Appeals of Maryland. On

June 30, 1989, the Court of Special Appeals of Maryland filed a reported opinion in case number 1654 in which the judgment of the Circuit Court was reversed. See Appendix p. A-19 A mandate was issued July 31, 1989.

East Prince Frederick Corporation (hereinafter referred to as the "Petitioner") filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland on August 16, 1990. The Petition was granted, the case heard and the Court of Appeals of Maryland upheld the decision of the Court of Special Appeals in an opinion filed July 31, 1990. The mandate was issued August 30, 1990.

Jurisdiction to review the judgment in this matter is conferred by 28 U.S.C. 1257(a).

28 U.S.C. Section 2403(b) may be applicable to this matter.

Statement of the Case

In 1978, the Petitioner's predecessor in interest reserved 4,400 gallons of sewer capacity from the Respondent's predecessor in interest. The fee for reserving that allocation was $11,000.00 which was paid by the Petitioner's predecessor in interest. No time limitations were placed on usage of the allocation. By a subsequent sewerage allocation policy adopted in Calvert County Resolution 37-83 (see Appendix p. A-1) and as amended in Calvert County Resolution 60-86 (see Appendix p. A-43), the Respondents changed the sewerage allocation policy thereby impairing the already existing contract rights of the Petitioner. The Petitioners are required by the new policy to use their reserved allocation within two years or lose the allocation if they do not pay an

additional fee which was described as a minimum user fee.

The Petitioner originally filed in the Circuit Court for Calvert County a Complaint for Declaratory Judgment, Injunction and Other Relief whereby it asked the Court to enjoin the Respondent from restricting the 4,400 gallon sewer allocation owned by the Petitioner. At the hearing before Judge Briscoe, the Respondent did not present any evidence as to the necessity and reasonableness of the resolutions which impaired the Petitioner's right under the original allocation contract. Judge Briscoe held that the new regulations as they pertained to Petitioner's already existing allocation were violative fo the rights guaranteed under the Tenth Amendment to the United States Constitution. In so holding, the Court found a substantial impairment of

Petitioner's contract rights. In as much as Respondent presented no evidence as to the reasonableness and necessity of the regulations which impaired Petitioner's contract, the Court could not, and did not, find that the impairment was reasonable and necessary to an important government interest.

Finding no direct evidence in the record as to the necessity and reasonableness of applying the new regulations to already existing contracts, the Court of Special Appeals drew inferences as to the purposes, reasonableness and necessity of Resolutions 37-83 and 60-86. The Court of Special Appeals went beyond the record of the trial court and filled in gaps left the Respondent's decision not to present evidence in support of the purpose, necessity and reasonableness of the new policy.

Argument

This case presents a textbook situation for review by the Supreme Court. The decision issued by the Court of Appeals of Maryland deals with a question of federal constitutional law and is in direct conflict with decisions of the Supreme Court.

This Court held in United States Trust Company v. New Jersey, 431 U.S. 1, 52 L.Ed 2d 92, 97 S.Ct. 1505 (1977) that the State had violated the contract clause of the United States Constitution because the sovereignty failed to demonstrate that the legislation was reasonable and necessary to serve an important state interest. The Court stated

> ...As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this

> standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.... 52 L.Ed 2d at 112.

As in United States Trust Co., the Respondents failed to produce any evidence as to the reasonableness and necessity of the new regulations concerning sewerage allocation. The Maryland Court of Appeals appears to have given "complete deference to [the Respondent's] legislative assessment of reasonableness and necessity" id. in going beyond the record to justify the change in regulations.

Although the Court of Appeals gives lip service to the principles enunciated

in United States Trust Co., the Court assumes without evidence that the situation which gave rise to the change in regulations was unforeseeable and could not have been dealt with in a less intrusive manner. It appears to have drawn this conclusion from passage by the Respondent of the very regulations which are in question.

In United States Trust Co. this Court held that a New Jersey could not interfere with the rights of certain holders of Port Authority bonds by repealing a 1962 statutory covenant which limited the ability of the Port Authority to subsidize mass transit from its own revenues and reserves. In its analysis, this Court indicated that the possible need to subsidize mass transit from Port Authority revenues and reserves was foreseeable at the time the 1962 statute was passed. Bondholders made their

purchases based on the covenant and the State could not later change its collective mind and attempt to amend the properties of bonds already purchased. Similarly, Respondent's need for additional sewer and water allocations was foreseeable in 1978 when Petitioner's predecessor in interest purchased its 4,400 gallon sewer allocation. Prince Frederick, in Calvert County, Maryland is in relatively close proximity to Washington D.C., a city with a historically expanding suburban sprawl. It is logical to assume that as the population increases so does the need for sewerage. The situation in which Calvert County found itself in 1983 was foreseeable and, in fact, presents a major problem throughout many of Maryland's suburban counties. Therefore, the Respondent had a obligation to consider the capacity

limitations of the sewer treatment system when it entered into contracts concerning allocations. Respondent failed to do so. The Petitioner should not suffer because the Respondent failed to consider future population growth. Respondent's actions were in violation of the Contract Clause.

The Court of Appeals assumed without evidence that the Respondent could not have foreseen the population growth which took place in the late seventies and early eighties. It then proceeded to lay the burden of showing that there was not a less onerous method of remedying the problem with which Respondent was faced at the feet of the Petitioner. This is clearly at odds with United States Trust Co. In that case this Court held that the issues of foreseeability and availability of less drastic means were part of the reasonable and necessary analysis. The Court of Appeals has

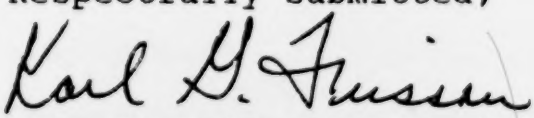
removed the latter issue from the analysis and made it a separate burden for the Petitioner. The current law of the State of Maryland, as set forth in the opinion of the Court of Appeals, is at odds with the decisions of this Court.

This case provides a golden opportunity for the Court to enunciate the proper standard for judicial review of legislation which affects already existing contracts. The Maryland Court of Appeals has restructured the reasonable and necessary analysis set forth in United States Trust Co. in a manner inconsistent with the decisions of this Court. Further the Court of Appeals has drawn inferences from outside the record. The Maryland Court's decision in this matter is in direct conflict with the decision of this Court and should be reviewed.

Although this case does not involve extremely large sums of money, it is a perfect example of a government body enacting regulations which substantially impair a citizen's already existing contract rights. Moreover, the decision of the Court of Appeals presents a classic case of restructuring an analysis to change the result in a manner inconsistent with the decision of this Court.

For all the above reasons, the Petitioner respectfully prays that a writ of certiorari be granted in this matter.

Respectfully submitted,



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RESOLUTION NO. 37-83

CALVERT COUNTY SEWERAGE ALLOCATION POLICY

This policy applies to all County owned sewerage facilities. The policy, adopted by the Commissioners under provisions of Section 9-1206 of the Maryland Health Article, provides procedures for submitting formal requests for sewer allocation, and establishes Reserved and Standby Sewerage allocation Lists to provide allocated sewerage capacity for developers.

1. Allocation will be made based on Equivalent Dwelling Units (EDU) with EDU's being defined as in Resolution No. 28-81.

2. Requests for sewerage capacity

allocation must be in writing to the Calvert County Water and Sewerage Division. The request shall include the following:

a. Applicant's name and mailing address,

b. Tax map and parcel number of property for which allocation is requested,

c. Description of proposed development,

d. Amount of allocation requested in gallons per day and method of determining this amount,

e. Estimated dates for start of construction and connection to the sewerage system.

3. Allocations will be granted on a

first come, first served basis according to the date of the written request.

4. If sewerage capacity is available, the Calvert County Water and Sewerage Division will notify the applicant. To secure the allocation, a deposit equal to 150 percent of the applicable capital connection charge must be paid within thirty (30) days. After payment is received, the applicant will be placed on the Reserved Sewerage Allocation List. Two thirds (66 2/3%) of this deposit is non-refundable.

5. Approved sewerage allocations will remain in effect for a period of two years. At the end of two (2) years the allocation will be canceled, and one third (33 1/3%) of the capital connection

returned, or the applicant may elect, by written modification addressed to the Water and Sewerage Division, to:

a. begin paying debt service minimum user charges on the property, in which case the allocation becomes permanent and one third (33 1/3%) of the capital connection deposit is returned, or

b. justify in writing to the Water and Sewerage Division that the property for which an allocation is being held is within the following stages of the development:

(1) submission of required Site Plan or Subdivision Plat to the appropriate County Agency, followed within thirty (30) days of approval by;

(2) application for County

Building and Grading Permits and submission to the Water and Sewerage Division a time schedule identifying a date of connection to the sewerage system, followed within ninety (90) days of issuance of said permits and time schedule approval by the Water and Sewerage Division by;

(3) award of construction contract, followed by;

(4) initiation of construction and progression of construction in accordance with the approved time schedule.

Under this Section, upon written request, the allocation can be extended a designated time period by the Water and Sewerage Division, in accordance with the approved time schedule, to allow

completion of the construction. Additional extensions will require written justification and must be approved by the Calvert County Board of Commissioners.

An applicant who has been granted an allocation may voluntarily relinquish the allocation at any time, in which case one third (33 1/3%) of the capital connection deposit shall be returned. Cancellation of County Building Permits due to conditions outlined in Section 106.3 of the Calvert county Building code will also serve to cancel the Sewerage Allocation, provided that: (a) the two year allocation period has expired, and (b) the debt service charges and minimum user charges are not being paid.

6. Allocations are for designated

properties and are not transferable.

7. If sewerage capacity is not available at the time of the written request, the Water and Sewerage Division will notify the applicant in writing that the requested allocation will be placed on a Standby Sewerage Allocation List. When capacity becomes available, applicants will be notified that allocation of capacity will be reserved upon receipt of deposit as provided in Paragraph "4" above.

8. Allocations paid for, but not used prior to adoption of this Policy by the Calvert county Board of Commissioners, will remain on the Reserved Sewerage Allocation List for a period of two years from the effective date of this Policy.

At the end of the two year period, the capital connection fees will be refunded and the allocation canceled, unless the provisions outlined in Paragraph 5 a and b of this Policy are satisfied.

Cancellations of County Building Permits due to conditions outlined in Section 106.3 of the Calvert County Building Code will also serve to cancel the Sewerage Allocation, provided that: a) the two year allocation period has expired, and b) the debt service charges and minimum user charges are not being paid.

9. Sewerage allocations granted for rights-of-way (ROW) can remain on the Reserved Sewerage Allocation List indefinitely. Use of ROW allocations can be deferred by written consent of the ROW

allocation owner, thereby allowing the Court to assign the ROW allocation to other property. Any deferral of use will be for a specific time period designated in the ROW allocation owner's consent. Following this designated time period, the ROW allocation will be reinstated on the Reserved Sewerage Allocation List.

10. The Reserved Sewerage Allocation List and the Standby Sewerage Allocation List shall be kept current by the Water and Sewerage Division.

11. Parties on the Reserved Sewerage Allocation List and the Standby Sewerage Allocation List shall be notified by the Calvert County Water and Sewerage Division annually of their position and status.

This Policy adopted the Eleventh day of October, 1983.

BY: Calvert County Board of Commissioners

/s/
William T. Bowen, President

/s/
John M. Gott, Sr., Vice President

/s/
Garner T. Grover

/s/
Mary D. Harrison

/s/
George J. Weems, M.D.

Attest:

/s/
Ann F. O'Neill, Clerk

Approved as to form and legal sufficiency:

/s/

Allen S. Handen
County Attorney
Date: _____

EAST PRINCE FREDERICK CORPORATION	)	IN THE CIRCUIT
-VS-	)	COURT FOR
BOARD OF COUNTY COMMISSIONERS FOR CALVERT COUNTY	)	CALVERT COUNTY, MARYLAND
	)	CA 87-295

OPINION AND ORDER OF COURT

On June 9, 1987, Plaintiff filed this action for Declaratory and Injunctive Relief. Plaintiff has requested an injunction prohibiting the Defendant Board of County Commissioners of Calvert County and/or any of its agencies from cancelling or restricting the allocation of 4,400 gallons of sewer capacity owned by Plaintiff, and a declaration that any policy adopted by the Defendant Board regarding sewer allocation after July 1978 be held inapplicable to the Plaintiff's

4,400 gallon capacity. Plaintiffs also requested the Court to assess damages and costs.

This case was heard on August 16, 1988, at which time the Court took it under advisement and directed Plaintiff and Defendant to file memoranda of law. The Court, having reviewed the pleadings, heard the testimony and considered the memoranda of counsel, now makes the following findings of fact and rulings.

In July of 1978 Plaintiff, East Prince Frederick Corporation, by Norman Busada, paid $11,000 to the Calvert County Sanitary District to reserve 4,400 gallons of daily water and sewage capacity in the Prince Frederick Sewage Treatment Plant. The capacity was purchased from the

Calvert County Sanitary District which has since been abolished. The Defendant is the successor in interest to the Sanitary District. According to the uncontradicted testimony of Mr. Busada, the parties understood this to be a permanent reservation with no restrictions on when the Plaintiff was to begin using the capacity. There was a written agreement (Plaintiff's exhibit 6), but the agreement is silent as to the issue of the length of the reservation.

In 1983, the Board of County Commissioners adopted a new sewage allocation policy found in Resolution 37-83, Plaintiff's exhibit 11. Since that time amendments have been made to that resolution, and the current resolution in

force as to sewage allocation is 60-86, Plaintiff's Exhibit 5. The new sewage allocation policy established what was referred to at the time of the hearing as a "use it or lose it" policy. This new policy requires that allocated capacity must be used within 2 years. If an allocation holder does not use the allocation within the two years, then the allocation is cancelled, or alternatively, the holder may avoid cancellation by paying minimum user fees. It is the application of this "use it or lose it" policy that Plaintiff seeks to enjoin.

The Court finds that the application of the County's use it or lose it" policy to the Plaintiff would be violative of the Plaintiff's rights under the 10th

Amendment to the United States Constitution. To find such a violation the Court must find a substantial impairment of contract, Chevy Chase Savings and Loan v. State 306 Md 384, 509 A2d. 670 (1986). This substantial impairment must also be reasonable and not necessary to serve an important public purpose. US Trust Co. of New York v. New Jersey 431 U.S. 1, 97 S.Ct. 1505, 52 LEd.2d 92 (1977).

The Court finds that the application of a two year time limit or minimum user fees to Plaintiff would constitute a substantial impairment of its rights. Defendant presented evidence that the reason for the new sewage policy is the limited sewer capacity in Calvert County.

The Court finds that although this is good reason to limit new allocations, no evidence was presented which would indicate that it was either necessary or reasonable to limit Plaintiff's rights under the original agreement.

Because the Court finds that the impairment of Plaintiff's contract rights by the County would not serve a reasonable or necessary public purpose, it makes the following rulings:

1. The Defendant Board of County Commissioners of Calvert County is hereby enjoined permanently from cancelling or restricting the allocation of 4,400 gallons of sewer and water capacity owned by Plaintiff.

2. The Court declares that the

policies adopted by Defendant after July of 1978 regarding sewer allocations are inapplicable to the 4,400 gallon capacity owned by Plaintiff.

3. No evidence having been presented as to damages, none are awarded.

4. Court costs to be paid by Plaintiff.

/s/
JUDGE

DATE 11/4/88

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1654

September Term, 1988

BOARD OF COUNTY COMMISSIONERS
OF CALVERT COUNTY, MARYLAND

V.

EAST PRINCE FREDERICK CORPORATION

Bishop,
Bell, Rosalyn B.,
Karwacki,

JJ.

OPINION BY BELL, ROSALYN B., J.

Filed: June 30, 1989

The Board of County Commissioners of Calvert County (County) appeal a ruling of the Circuit Court for Calvert County. On November 11, 1984, the trial court held that the application of a two-year time limit or minimum user fees to the East Prince Frederick Corporation (appellee) would violate appellee's right under the contract clause contained in the federal constitution.[1] The board presents two

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[1]Maryland Jud. Proc. Code Ann. Section 3-405 (1974, 1984 Repl. Vol.), provides in pertinent part:

"(c) Role of Attorney General.--If the statute, municipal or county ordinance, or franchise is alleged to be unconstitutional, the Attorney General need not be made a party but, immediately after suit has been filed, shall be served with a copy of the proceedings by certified mail. He is entitled to be heard, submit his views in writing within a time deemed reasonable by the court, or seek intervention pursuant to the Maryland Rules."

issues for our consideration:

> -- Did the County's action in imposing a "use-it-or-lose-it" policy after entering into a contract with appellee for a water and sewer reservation violate appellee's rights under the contract clause of the federal constitution?
>
> -- Did appellee meet its burden of proof?

In July of 1978, appellee's predecessors in title reserved 4,400 gallons of sewage and water usage capacity from the County, paying $11,000. At that time, there was no restriction as to when appellee had to begin to use that capacity, and the parties understood that

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Because this was a declaratory judgment action, the Attorney General should have been notified. Board of County Comm'rs of St. Mary's County v. Gardner, ____ Md. ___, ____ (1989) (No. 610, Sept. Term, 1988, slip op. at 1, filed May 3, 1989). The Attorney General has not made his position known, and the record does not indicate whether there was compliance with Section 3-405(c). Neither side ha raised the issue.

the 4,400-gallon allocation would be reserved until appellee, which was seeking to develop a small shopping strip, was ready to use it. At the time of the transaction, appellee had received all necessary approvals and a a building permit had been issued. Construction was begun on the site, thus preserving the zoning status and the building permit, but a sewer moratorium imposed by the State health department prevented use of the sewer capacity, and construction was suspended. The moratorium was lifted in 1982, but appellee did not resume construction.

In 1983, the County imposed a "use it or lose it" policy. The new policy required that the allocated capacity must be used within two years. The allocation

is cancelled if the holder does not use the allocation within two years; alternatively, the holder may avoid cancellation by paying minimum user fees. In accordance with that provision, appellee was billed approximately $2,000 in 1985.

Appellee denied that it was subject to these fees because of its prior contract with the County, and requested a hearing before the County Commissioners, who determined that the new policy did apply to appellee's property. Appellee filed a complaint seeking, inter alia, declaratory judgment and an injunction at the circuit court level. The circuit court concluded that the County's "use it or lose it" policy violated appellee's

rights under the contract clause of the federal constitution.[2] Specifically, the circuit court found that the policy substantially impaired the 1978 contract between appellee and the County.

The circuit court also found that, although the limited sewer capacity in Calvert County was a good reason for limiting new allocations, there was no evidence indicating that it was either necessary or reasonable to limit appellee's rights under the original

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[2]The contract clause, Art. I, Section 10 of the United States Constitution provides in pertinent part:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post factro Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." Emphasis added.)

agreement. We disagree and explain after setting forth the relevant law.

--The Contract Clause--

The contract clause limits the power of the States to modify their own contracts, as well s to regulate those between private parties. For nearly a century after the Constitution was adopted, it was one of the few express limitations on State power. Over the last century, however, the Fourteenth Amendment has assumed a larger place in constitutional adjudication. United States Trust Co. v. New Jersey, 431 U.S. 1, 15 (1977).

The prohibition against impairment of the obligation of contract is not an absolute one, however, and "is not to be read with literal exactness like a

mathematical formula." Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398, 428 (1934). In El Paso v. Simmons, 379 U.S. 497, 508-09, reh'g denied, 380 U.S. 926 (1965), the Court reviewed its prior holdings to illustrate the balance between the contract clause and state interest in enacting laws to safeguard its people's interests:

> "'It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order....This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.' Morever, the "economic interests of the State may justify the exercise of its continuing and dominant protective

> power notwithstanding interference with contracts." The State has the "sovereign right...to protect the...general welfare of the people.... Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" As Mr. Justice Johnson said in Ogden v. Saunders, '[i]t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.'" (Citations omitted.) (Ellipses in original.)

As Justice Holmes stated in Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908), "One whose rights, such as they re, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."

In United States Trust Co. v. New Jersey, 431 U.S. 1, 21 (1977), the leading and most recent case on state impairment of contract, the Supreme Court held that

New Jersey had impaired the rights of certain holders of Port authority bonds by repealing a 1962 statutory covenant which had limited the ability of the Port Authority to subsidize mass transit from its own revenues and reserves. The Court stated, at 25-26:

> "The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." (Footnotes omitted.) (Emphasis added.)

It is thus apparent that a heightened standard of review is applied when the State is a party to a contract, especially where the only purpose of the legislative act is to raise money.

In United States Trust, 431 U.S. at 31, the court stated that the extent of the contractual impairment i relevant in determining whether the State action was reasonable and necessary to serve an important public interest. In this context, the Court remarked that "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." The Court conceded in United States Trust that the State's interests in mass transportation and energy conservation were important and legitimate interests.

The Court held, however, that the State's action in repealing the 1962 covenant, which had until repeal served to protect Port Authority bondholders' interests, was unreasonable and unnecessary to achieve the State's plan to encourage private automobile users to shift to public transportation. Simply put, the Court found that the State could find other ways to raise funds to promote mass transit. United States Trust, 431 U.S. at 28-32.

In United States Trust, 431 U.S. at 23, the Court noted that, when a State impairs the obligation of its own contract, the reserved-powers doctrine comes into play:

> "The initial inquiry concerns the ability of the State to enter into an agreement that limit its power to act in the future. As early as Fletcher v. Peck, the Court considered the

> argument that 'one legislature cannot abridge the powers of a succeeding legislature.' 6 Cranch, at 135. It is often stated that 'the legislature cannot bargain away the police power of a State.' This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." (Citation omitted.) (Footnote omitted.) (Emphasis added.)

We look, then, at the contract in the instant case. Both parties agree that appellee paid consideration for a water and sewer reservation. At the time the agreement was entered into, there was no restriction on when appellee could begin to use the 4,400-gallon allocation. The agreement was silent, however, in regard to how long the reservation could be held.

But could the County create and vest irrevocable contract rights in sewer and water reservations, such that would abridge the powers of subsequent county commissioners? Put another way, should appellee's reservation be considered paramount no matter what kind of sewer and water emergency developed in Calvert County? We do not think so.

The rationale behind the County's use-it-or-lose-it policy was the very limited sewer capacity exiting in the County, a valid legislative concern. See Robert T. Foley Co. v. Washington Suburban Sanitary Commission, 283 Md. 140, 148 (1978). The County would not have had the power to create sewer rights in perpetuity, which would effectively prevent the enactment of future laws to

fit changes circumstances. The County did not and could not, we feel, agree to this sort of arrangement.

Apart from this, we are not convinced that there was a substantial impairment of the contractural right. The severity of the impairment is important in determining whether the State action affecting the contractual obligation has been carried out constitutionally. State v. Good Samaritan Hospital, 299 Md. 310, 321, appeal dismissed, 469 U.S. 802 (1984). Here, there was no danger that appellee would lose the allocation if it either used the allocation within two years or paid a fee. The County would hold the allocation until appellee was ready to develop so long s the fee was paid. Simply adding a new obligation, by itself,

does not constitute "substantial" impairment. Rather, the obligation must be one conspicuously beyond what was originally contemplated. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 240 (1978). In Allied, 438 U.S. at 247, the Court based its finding of substantial impairment on an obligation that imposed "a completely unexpected liability in potentially disabling amounts." In the instant case, appellee presented no evidence bearing on how the minimum user fees would have a severe impact such as to produce a substantial impairment of its right to a reservation. Indeed, there was tstimony that appellee had spent close to $90,000 on its own water pipe system, thus giving some perspective to the $2,000 minimum user

fee. It thus could hardly be said to constitute a completely unexpected liability in potentially disabling amounts. Forfeiture of the allocation would, of course, have a far more serious impact, but forfeiture is entirely avoidable by paying the minimum fee.

Even if payment of a minimum user fee were considered to be a substantial impairment, the County's policy was reasonable and necessary to serve an important public purpose. At the outset, we observed that wide discretion is vested in a legislature to determine what is reasonable and necessary. As stated in United States Trust, 431 U.S. at 23, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."

The purpose of the County's use-it-or-lose-it policy was the problem of limited sewer capacity. With a waiting list of persons wanting sewer capacity that was not available, it would be eminently unsound, indeed a public burden, to have allocations which are reserved in perpetuity, yet never used by the allocation holder. It must be remembered that the County receives no money (except a minimum user fee) <u>until</u> an allocation holder begins to use the system. A pay or forfeit rule weeds out those who are holding their allocations for speculative purposes. Thus, contrary to the position espoused by appellee, the County's policy has a purpose <u>in addition to</u> raising money. The policy allows a reasonable time period for development, and then

allows those who, for whatever reason, cannot yet develop to preserve their allocations by paying the fee. In short, the County policy was reasonable and necessary because it forced those just sitting on their allocations to either release that limited resource for use by someone else or take affirmative steps to preserve it for themselves.

This situation is analogous to the impairment upheld in El Paso, 379 U.S. at 499, in which the State reduced the perpetual right of redemption for holders who had forfeited lands to the State to a five-year right. The Court held that the reduction was necessary to achieve orderly administration of the school lands program, just as the scheme before us is necessary for orderly administration of

the sewer system. In El Paso, 379 U.S. at 516, the Court noted:

> "Timeless reinstatement rights prevented the state from maintaining an orderly system of land sales.... The program adopted at the turn of the century...was not wholly effectual to serve the objectives of the State's land program many decades later."

Similarly, in the instant case, when the sewer treatment system was in its infancy, perpetual reservations might not have presented a problem. But when the point was eventually reached in Calvert County where demand was so great that names were no longer being added to the waiting list, modification became eminently reasonable.

The reasonableness of the fees is supported by yet another fact. The County raises money to operate the sewer system through user charges. In order to achieve that needed level of income, it was

reasonable and necessary to expect that, within a certain period, allocation holders would begin using their allocations and contributing financially to the system. It appellee did not use its allocation within this normal course of time, it was reasonable and necessary to require that appellee begin paying the minimum amount that that allocation would have been executed to generate when the capacity was originally set aside.

Appellee argues that this situation was analogous to that presented in Farmer v.Jamieson, 31 Md. App. 37 (1976). We disagree. In that case, we held it to be an improper impairment for the local government to attempt to remove from master sewer lists a property that had been previously approved for sewer

allocation. The Court said that the agreement had become "a binding and enforceable contract, at least after the developers spent substantial sums in reliance thereon. Farmer, 31 Md. App. at 44 (emphasis added). Appellee argues that it, too, has expended substantial sums in reliance, and therefore its allocation cannot be cancelled. Putting aside for the moment the fact that fee collection, not cancellation, is the issue here, the fact is that the expenditure of funds by appellee "in reliance" came after the passage of the resolution complained of,[3] and after it was clear, because of user-fee billings, that the County considered appellee to be covered by its terms.

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[3]Appellee spent approximately $90,000 to extend water and sewer lines sometime in 1986 or 1987.

Thus, any reliance on the part of appellee was without justification. The reliance needed to form estoppel does not occur where the person claiming benefit of the defense has actual notice of the facts, making reliance unreasonable. The party must be misled and change his or her position for the worse, believing and relying on the representations of the party sought to be estopped. See Savonia v. Burke, 241 Md. 316, 317-21 (1966).

In sum, the obligation imposed on appellee was not a substantial impairment. Even assuming that it was, the legislative scheme under which it was imposed was reasonable and necessary to achieve an important public purpose. Because we find no violation of the contract clause, we do

not need to reach the second issue presented by the County.

JUDGMENT REVERSED.
COSTS TO BE PAID BY APPELLEE.

RESOLUTION NO 60-86
PERTAINING TO THE CALVERT COUNTY SEWERAGE ALLOCATION POLICY

WHEREAS, a sewerage allocation policy was adopted by Resolution No. 37-83, modified by Resolution No. 63-84 and by Resolution No. 42-85 and;

WHEREAS, circumstances now require that these regulations be replaced by a single resolution to e enforced county wide at all three Sewerage Sanitary Districts, Prince Frederick, Solomons, and Beaches;

WHEREAS, the Board of County Commissioners is authorized by the Health Article of the Annotated Code of Maryland to establish such rules as circumstances require for the allocation of wastewater treatment capacity;

NOW, THEREFORE, BE IT RESOLVED by the

Board of County Commissioners of Calvert County that the following policy and procedures are hereby designated as the Calvert County Sewerage Allocation Policy.

This sewerage allocation policy applies to all county owned sewerage facilities. This policy provides procedures for submitting requests for allocation and establishes the procedure for providing sewerage capacity for developers.

1) Allocations will be based on capital connections using formulas as detailed in Resolution 28-81;

2) Necessary capital connections will be determined by the Chief of Water & Sewerage Division. Information is obtained form a site plan submitted through the Division of Inspections and

Permits for approval. Water and sewerage approval is contingent on receipt of a 1/3 receipt of the applicable capital connection charge.

3) Allocations will be made only if the proposed development has an appropriate ranking on the request list.

4) The ranking on this list is on a first come-first served basis, on the date of receipt of the written request. This ranking will be good for one year. Prior to the end of the year, a site plan must be submitted for the subject property, or the ranking will expire.

5) An estimated construction/hook-up schedule must be submitted along with the site plan.

6) Sewerage capacity will be allocated on a two year need basis,

according to the approved construction schedule, in any case not to exceed 75 capital connections per year per development.

7) Allocations remain with the development as long as the following payment criteria is maintained.

a) When the Public Works Agreement is requested, an additional 1/3 deposit on those units covered in the Public Works Agreement is due.

b) When a building permit is applied for, or three years from site plan approval, whichever comes first, the entire capital connection charge is due.

c) If unused after 2 years from site plan approval, minimum user fees and debt service payments are due.

d) If the above payment criteria

is not met, partial payments as well as the allocation is forfeited.

8) If an allocation owner decides to relinquish the allocations prior to the end of two years, a pro-rata share of the allocation fee is returned and the allocation placed back into the general allocation pool.

9) No additional allocations can be granted until the approved allocation is exhausted or under construction.

10) Allocations are for designated properties and are not transferable from one property to another.

11) Sewerage capacity cannot be transferred from one owner to another unless the original development, as submitted on the approved site plan remains unchanged. If changed, a pro-rata

share of all fees is returned to the original owner and the new owner must re-submit.

12) Any development requesting an allocation must agree to employ strict water conservation devices as detailed in the proposed Calvert County Water Conservation Plan.

13) One third of the available allocation is set aside to provide service to those projects which are deemed necessary for the economic growth of the county, or deemed necessary for the routine function of government.

GIVEN UNDER OUR HANDS AND SEAL THIS 3RD day of June, 1986.

BOARD OF COUNTY COMMISSIONERS

/s/

John M. Gott, Sr., President

/s/
William T. Bowen, Vice President

/s/
Garner T. Grover

/s/
Mary D. Harrison

/s/
George D. Weems, M.D.

ATTEST:

/s/
Ann F. O'Neill, Clerk

EAST PRINCE FREDERICK CORPORATION P.O. Box J Prince Frederick, Md 20678	)	IN THE CIRCUIT COURT FOR CALVERT COUNTY MARYLAND
-Vs.-	)	
BOARD OF COUNTY COMMISSIONERS FOR CALVERT COUNTY Court House Prince Frederick, Md. 20678	)	CASE NO CA-87-295

DECLARATORY JUDGMENT,
INJUNCTION AND OTHER RELIEF

Come no the plaintiff, East Prince Frederick Corporation, by and through its attorney, Naji P. Maloof, and moves this Honorable Court to declare the rights of the plaintiff, and to enjoin the defendants, Board of County Commissioners and/or any agency of the County Government from revoking, completely or in any way diminishing the sewer capacity owned by

the plaintiff, and/or to enjoin the County and any agency thereof from charging any fees for usage until such time as the plaintiff herein is hooked up to the system, and for reasons, therefore, states as follows:

1. That the plaintiff herein is the owner of a parcel of property located in Calvert County, Maryland, consisting of approximately 4 acres known as the East Prince Frederick Corporation property, and formerly in the name of Busada and Abdow.

2. That the predecessors in title, namely, Busada and Abdow, on or about July of 1978 purchased from the the Calvert County Sanitary District, Inc. 4,400 gallons of capacity in the sewerage treatment plant in Prince Frederick, Maryland, at which time there were no

restrictions or policies regarding when such capacity was to be used.

3. That at the time of the purchase of the capacity was made from the Calvert County Sanitary District, Inc., the Calvert County Sanitary District, Inc. was not in a position to serve the subject property inasmuch as there were no sewer lines near the property, and the Sanitary District had no ability to run any sewer lines to the subject property even though the property was within the Prince Frederick Sanitary District, and could only be served by the Calvert County Sanitary District, Prince Frederick subdistrict.

4. That subsequent to the purchase of the capacity, a moratorium was placed on the Prince Frederick sewerage treatment

plant which was to serve the subject property, therefore further making it impossible for the subject property to be served.

5. That subsequent to the purchase of the capacity, the Calvert County Sanitary District was abolished by statute and the successor in interest to the Calvert County Sanitary District, Inc. became the Board of County Commissioners of Calvert County.

6. That at no time from July, 1978 to the present did the Calvert County Sanitary District, Inc. nor the Board of County Commissioners on behalf of Calvert County ever extend any sewer or water lines to the subject property.

7. That subsequent to the purchase of the capacity, the plaintiffs herein

purchased from the Estate of Eli Abdow and from Norman Busada all rights, title and interest in the property including the right to any sewer connections.

8. That in 1983 the Board of County Commissioners of Calvert County had hearings regarding the adoption of a policy pertaining to the usage of sewer capacities which had been purchased.

9. That the plaintiff herein through its attorney appeared before the Board of County Commissioners and indicated that he did not feel that any policy passed in 1983 would have any affect on changing the contractural obligations entered into in 1978 between the predecessors in title to the property and the predecessors to the Board of County Commissioners.

10. That there was never any ruling

as to the applicability of the policy sought to be adopted as to the plaintiffs herein.

11. That the Board of County Commissioners adopted a policy pertaining to capacity.

12. That said policy was against amended in 1985-86.

13. That in 1986, the plaintiffs herein started receiving billings for usage for the sewer capacity which had been previously purchased.

14. That as early as February, 1986, the plaintiffs requested a hearing before the Board of County Commissioners to resolve the matter of applicability of the sewer policy to the subject property.

15. That subsequent requests were made regarding a hearing before the Board

of County Commissioners.

16. That no hearing before the Board of County Commissioners was had until May 19, 1987; at which time the Board of County Commissioners determined that the sewerage allocation policy would apply to the subject property and that a usage charge billing of $2,967.39 was due and if the same were not used the allocation would be cancelled.

17. That the plaintiffs herein contend that any policy subsequent to the entrance of the agreement between the Calvert County Sanitary District, Inc. and purchasers of the capacity in 1978 would not be applicable to the plaintiffs.

18. That any attempt at passing such a policy would violate the Constitution of the United States and the State of

Maryland.

19. That if the allocation is cancelled, that the plaintiffs herein would suffer irreparable harm inasmuch as there is no other sewer capacity available, and none in the foreseeable future that serve the subject property.

20. That at the sole expense of the plaintiffs herein, they extended the sewer and water lines to the subject property.

21. That subsequent to doing so and prior to being able to construct on the subject property, the Board of County Commissioners adopted the moratorium on the subject property, further making it impossible for the plaintiffs herein to use the property and/or the sewer capacity.

22. That on numerous occasions and

at the hearing on May 19, 1987, the President of the Board of County Commissioners indicated that he felt that the plaintiffs herein were controlling all of the development in Prince Frederick and therefore felt that the allocation should be cancelled or the payments made.

23. That the sewer policy adopted by the Board of County Commissioners further attempts to restrict the rights of the plaintiff from transferring any allocation to any other property.

24. That the reason for attempting to include the allocation on the subject property is the new policy is solely for the purpose of depriving the owners of the use of the sewer allocation and of the use of their property.

25. And for such other and further

reasons as may be set forth on a hearing on this matter.

WHEREFORE, the plaintiffs herein respectfully move this Honorable Court:

1. To issue an injunction pendente lite and permanently preventing the Board of County Commissioners and/or any agency of Calvert County from cancelling or in any way restricting the allocation of 4,400 gallons of sewer capacity owned by the plaintiff.

2. To declare that any policy adopted by the Board of County Commissioners regarding sewer allocations adopted after July, 1978 be held to be inapplicable as to the plaintiff and the 4,400 gallon capacity owned by the plaintiff.

3. To assess damages and costs

against the defendants.

4. And for such other and further relief as the nature of this case may require.

/s/

Naji P. Maloof
Attorney for Plaintiff
P.O. Box P
Upper Marlboro, MD 20772
627-5900

IN THE COURT OF APPEALS OF MARYLAND

No. 118

September Term, 1989

EAST PRINCE FREDERICK CORPORATION

v.

BOARD OF COUNTY COMMISSIONERS OF CALVERT COUNTY, MARYLAND

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Chasanow,

J.J.

Opinion by Adkins, J.

Filed: July 31, 1990

Whether Calvert County's "use-it-or-lose-it" sewer and water allocation policy violates the Contract Clause of the United States Constitution is the issue before us.[1] Perceiving no constitutional violation, we affirm the judgment of the Court of Special Appeals.

I.

The facts that frame the controversy are reasonably straightforward. In July, 1978 petitioner, East Prince Frederick

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[1] Article I, Section 10, Clause 1 of the United States Constitution provides in pertinent part that "[n]o State shall... pass any... Law impairing the Obligation of Contracts..."

Corporation (EPF), (actually its predecessor in interest), paid a capital connection fee of $11,000 to respondents, the Board of County Commissioners of Calvert County (Calvert County), (actually, its predecessor, Calvert County Sanitary District, Inc.), to reserve a daily allocation of 4,400 gallons of sewer and water usage. The allocation was to serve a planned "shopping strip." The document granting the allocation contained no temporal limit on its duration; so far as the document is concerned, it might be read to grant a 4,400 gallon reservation of capacity in perpetuity. Certainly, it was in no way conditioned on EPF's use of the allocation by any specified time.

Although EPF expended $85,000 to $90,000 to install water and sewer lines on its property, the "shopping strip" has never been constructed. The reasons for this are not entirely clear. The fault may be attributed partially to EPF, and partially to various governmental actions, including the State Highway Administration's refusal to permit access from the property to a State highway. In any case, EPF has never hooked up to Calvert County's sewer and water system; the 4,400 gallon daily allocation remains unused by EPF and unavailable to anyone else.

In 1983, faced with a total lack of additional water and sewer capacity, Calvert County adopted

Resolution 37-83. The resolution set forth "procedures for submitting formal requests for sewage allocation, and establishe[d] Reserved and Standby Sewerage Allocation Lists to provide allocated sewerage capacity for developers." The policy established by the resolution was that "approved [but unused] sewerage allocations" were to remain in effect for two years. After that, the allocation would be canceled and one-third of the capital connection fee returned to the holder of the allocation. In the alternative, the holder could continue the reservation by either (a) paying debt service and minimum user charges or (b) certifying that the property was at a certain stage of development.

After some interim modifications, Resolution 37-83 was replaced, in 1986, by Resolution 60-86. This in pertinent part provided:

> 7) Allocations remain with the development as long as the following payment criteria [are] maintained.
>
> * * *
>
> c) If unused after two years from site plan approval, minimum user fees and debt service payments are due.
>
> d) If the above ... criteria [are] not met, ... the allocation is forfeited.

In 1985, Calvert County began billing EPF for minimum user charges. By the time of the trial in the Circuit Court for Calvert County (August, 1988), a sum of approximately $6,000 was claimed.

The trial in the circuit court was occasioned by EPF's request for a judicial declaration that "any policy adopted by the Board of County Commissioners regarding sewer allocations adopted after July, 1978 be held to be inapplicable as to [EPF] and the 4,400 gallon capacity owned by [EPF]." EPF also asked that Calvert County be enjoined "from canceling or in any way restricting the allocation of 4,400 gallons of sewer capacity owned by [EPF]." The corporation's chief argument in the circuit court was that the 1983 and 1986 resolutions unconstitutionally impaired the obligations of the allocation contract between it and Calvert County.

The circuit court agreed and granted the relief requested. It found that

> the application of a two year time limit or minimum user fees to [EPF] would constitute a substantial impairment of its rights. [Calvert County] presented evidence that the reason for the new sewage policy is the limited sewer capacity in [the county]. The Court finds that although this is good reason to limit new allocations, no evidence was presented which would indicate that it was necessary or reasonable to limit [EPF's] rights under the original agreement.[2]

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[2] The declaration of rights entered by the Circuit Court stated "that the policies adopted by [Calvert County] after July of 1978 regarding sewer allocations are inapplicable to the 4,400 gallon capacity owned by [EPF]." It seems clear to us that this declaration was based on the Contract Clause, the only legal issue discussed by the Circuit Court in its 7 November 1988 Opinion and Order of the Court. We note this because EPF suggested to the Court of Special Appeals and suggests to this Court

that if the Circuit Court was wrong in its Contract Clause analysis, then the case should be remanded there for determination of another issue -- the inapplicability of the 1986 resolution to EPF as a matter of statutory construction. This theory was probably not presented by EPF's complaint, and was not argued orally in the Circuit Court. It was raised by EPF (and answered by Calvert County) in post-trial memoranda.

Although the Circuit Court opinion is silent on the matter, we believe the judge must have decided this issue against EPF. If the 1986 resolution did not apply to EPF as a matter of statutory construction, then no Contract Clause issue was even before the court. Had the Circuit Court agreed with EPF's statutory construction argument, it would have decided the case on that basis, and would have had no need to reach the constitutional question. "It is elementary that appellate courts do not decide issues of constitutionality except as a last resort." Automobile Trade Ass'n v. Ins. Comm'r, 292 Md. 15, 21, 437 A.2d 199, 202 (1981). The same principle applies at the trial court level. We assume the Circuit Court was aware of it, heeded it, and therefore decided that the 1986 resolution did apply to EPF as a matter of statutory construction. See Capers v. State, 317 Md. 513, 519, 565

The Court of Special Appeals reversed. Reasoning that Calvert County could not grant a sewer and water allocation in perpetuity, the appellate court concluded that EPF's contract had not been substantially impaired. Board v. East Prince, 80 Md. App. 78, 85, 559 A.2d 822, 825 (1989). It held in the alternative that even if a substantial impairment had been effected, there was no violation of the Contract Clause because the policy established by the 1986 resolution was reasonable and necessary to serve an important public

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A.2d 331, 333-334 (1989).

purpose. Id. at 86-87, 559 A.2d at 825-826. We issued a writ of certiorari at the behest of EPF. 317 Md. 609, 565 A.2d 1033 (1989).

II.

The Court of Special Appeals applied the proper framework of analysis to the Contract Clause issue. The vigor and frequency with which the Contract Clause has been deployed to attack an alleged impairment of the obligations of public contracts has varied over time. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241, 98 S. Ct. 2716, 2720-2721, 57 L. Ed. 2d 727, 734 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1, 14-15, 97 S. Ct. 1505, 1514, 52 L. Ed. 2d 92, 104-105 (1977);

L. Tribe, American Constitutional Law Section 9-11, at 619-620 (2d ed. 1988). But whatever the history may be, United States Trust Co. makes it clear that the Clause presently is available as a potent weapon for that purpose. See also Allied Structural Steel Co. (dealing with impairment of the obligation of a private contract). Although the Clause is not to be read literally, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502, 107 S. Ct. 1232, 1251, 94 L. Ed. 2d 472, 499 (1987), and does not obliterate the power of a State to govern, id. at 503-504, 107 S. Ct. at 1251-1252, 94 L. Ed. 2d at 500, it can operate to void a state's attempt to

abrogate a contract the state has made, United States Trust Co., supra.

The Contract Clause analysis is applied in the manner explained by Judge Eldridge, for the Court, in Robert T. Foley Co. v. W.S.S.C., 283 Md. 140, 151, 389 A.2d 350, 357 (1978):

> First, it must be determined whether a contract existed. If that hurdle is successfully cleared by the claimant, a court next must decide whether an obligation under that contract was changed. Finally, ... the issue becomes whether the change unconstitutionally impairs the contract obligation, "[f]or it is not every modification of a contractual promise that impairs the obligation of contract under federal law..." City of El Paso v. Simmons, 379 U.S. 497, 506-507, 85 S. Ct. 577, 582-583, 13 L. Ed. 2d 446[, 453-454] (1965).

See also Md. State Teachers Ass'n v. Hughes, 594 F. Supp. 1353, 1358-1360 (D. Md. 1984), aff'd, No. 84-2213 (4th Cir. 5 Dec. 1985).

The final step is the most difficult one, for it involves the determination of whether the impairment was reasonable and necessary to serve an important public purpose. If it was, the impairment is not unconstitutional. United States Trust Co., 431 U.S. at 25, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112; Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 438, 54 S. Ct. 231, 240, 78 L. Ed. 413, 429 (1934); State v. Burning Tree Club, Inc., 315 Md. 254, 272, 554 A.2d 366, 375, cert. denied

_____ U.S. _____, 110 S. Ct. 66, 107 L. Ed. 2d 33 (1989); Chevy Chase Savings & Loan v. State, 306 Md. 384, 416, 509 A.2d 670, 686-687 (1986).

Bearing these precepts in mind, we turn to the case before us.

III.

Calvert County does not argue that there was no contract between it and EPF. The trial Court seems to have found that there was one and that its terms were that in exchange for the payment of $11,000 by EPF, Calvert County would set aside for that corporation 4,400 gallons of daily water and sewage capacity, this being "a permanent reservation with no restrictions on when [EPF] was to

begin using the capacity." Like the circuit court and the Court of Special Appeals, we shall assume that this was the contract.[3]

We shall also assume, arguendo, that the "use-it-or-lose-it" policy substantially changed the contract. That is, we assume the impairment was substantial enough to compel us to move to the third step of the analysis. Before the adoption of the

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[3] Whether Calvert County could bind itself to such a contract in perpetuity (i.e., whether the Board of County Commissioners could bind all future boards) and whether a contract of this nature is subject to an implied "reasonable time" limitation are questions of interest, but they have not been raised in this case and their resolution is not necessary to our decision, so we do not decide them.

"use-it-or-lose-it" policy, EPF had an unfettered contractual right to a water and sewer allocation; afterwards, the right was conditioned on payment of annual charges. That impairment is more than the de minimis changes involved in Board of Trustees v. City of Baltimore, 317 Md. 72, 101, 562 A.2d 720, 734 (1989) (Initial cost of 1/32 of 1 percent of pension trust's assets and ongoing annual cost of 1/20 of 1 percent might slightly diminish level of future variable benefits, but not so much as to approach constitutional standard for impairment.), cert. denied, _____ U.S. _____, 110 S. Ct. 1167, 107 L. Ed. 2d 1069 (1990). See also State v.

Good Samaritan Hospital, 299 Md. 310, 321-322, 473 A.2d 892, 897-898 (corporate charter is a contract, but it is not impaired by exercise of police power regulating industry of which corporation is a part), dismissed, 469 U.S. 802, 105 s. Ct. 56, 83 L. Ed. 2d 7 (1984).

But although we assume impairment here, we must pause to review its severity, for the severity of the impairment has a bearing on how closely a court will scrutinize the governmental action. See e.g., Allied Structural Steel Co., 438 U.S. at 245, 98 S. Ct. at 2722-2723, 57 L. Ed. 2d at 736-737. In that case, the contract, a private one, was a pension

plan to which only the employer contributed and which the employer could amend or terminate. The impairment was a Minnesota statute that imposed a "pension funding charge" on a corporation if it, among other things, closed a Minnesota office when the corporation's pension fund was insufficient to cover benefits for all employees who had worked at least ten years for the corporation. This included many who would not have been vested under Allied's plan. The Supreme Court characterized this impairment as severe. 438 U.S. at 246, 98 S. Ct. at 2733, 57 L. Ed. 2d at 737. The impairment "nullifie[d] express terms

of the company's contractual obligations, and impose[d] a completely unexpected liability in potentially disabling amount. "Id. at 247, 98 S. Ct. at 2724, 57 L. Ed. 2d at 738.

In United States Trust Co., the impairment was total, since the "outright repeal" of a statutory covenant with bondholders "totally eliminated an important security provision and thus impaired the obligation of the States' contract." 431 U.S. at 19, 97 S. Ct. at 1516, 52 L. Ed. 2d at 108. There was substantial impairment in Keystone Bituminous Coal Ass'n as well. In Keystone, mining companies had

obtained damage waivers from landowners of land surface areas from whom the companies had purchased underground mineral rights. The statute under attack, in effect, prevented the mining companies from extracting some of the coal they had acquired from the landowners by preventing the companies from holding the surface owners to those original waivers of liability for surface damage. 480 U.S. at 504, 107 S. Ct. at 1252, 94 L. Ed. 2d at 500.

The impairment is not as great in this case. EPF can choose between losing its allocation and retaining it for future use, although the latter course of action imposes some financial burden on it. The relative

amount of that burden, however, is not great. But more important is the existence of the option. In Burning Tree, we assumed a substantial impairment of contractual obligation, but found no constitutional violation because the Burning Tree Club could choose either to change its discriminatory policies and retain a preferential tax assessment, or to retain the discriminatory policies and lose the tax break. 315 Md. at 272, 554 A.2d at 375. See also Md. State Teachers Ass'n, 594 F. Supp. at 1362 (In finding that State action did not violate the Contract Clause the court pointed out that modified pension plans for teachers and state employees

permitted those individuals to select between new plans, including one that offered all prior benefits, but at an increased cost.).

Thus we have only a modest degree of impairment with respect to an area (regulation of public water and sewer systems) in which a party must anticipate extensive governmental activity. See Robert T. Foley, 283 Md. at 152, 389 A.2d at 357. In a heavily state-regulated area, the individual's expectations of immutability of contract are reduced, and change is more readily upheld. Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 413-416, 103 S. Ct. 697, 705-707, 74 L. Ed. 2d 569,

583-584 (1983); Chevy Chase, 306 Md. at 411-412, 509 A.2d at 684. But since there is (as we assume) an impairment, we proceed to the next step of the analysis.

EPF does not seriously question that Calvert County's policy was designed to further a significant and legitimate public purpose. The purpose was to provide a sewer and water system designed to protect public health and welfare and to foster reasonable growth in the county. See Burning Tree Club, 315 MD. at 272, 554 A.2d at 375 (significance and legitimacy of public purpose to eliminate State-sanctioned sex discrimination "is beyond doubt");

Chevy Chase, 306 Md. at 416, 509 A.2d at 686-687 (Purpose "to quell further panic by preventing illiquidity in member associations not in conservatorship or receivership" is significant and legitimate public purpose of state in dealing with the savings and loan emergency.); Automobile Trade Ass'n v. Ins. Comm'r, 292 Md. 15, 33, 437 A.2d 199, 208 (1981) ("[P]ublic purpose of assuring the solvency and financial well-being of credit life insurance companies operating within the State of Maryland" is "discernible public purpose ... within reach of the State's police powers."). The debate is about whether the "use-it-or-lose

-it" policy was a reasonable and necessary way of advancing that important public purpose.

The circuit court believed that "no evidence was presented which would indicate that it was either necessary or reasonable to limit [EPF's] rights under the original agreement." If by this the court meant that Calvert County had presented no evidence on these subjects, the court was correct. All testimony was introduced through witnesses produced by EPF and all exhibits but one were introduced by that party. But, if the court meant that the record was devoid of evidence on these topics, it was clearly incorrect. We accept that Calvert

County bore some burden with respect to evidence of reasonableness and necessity. See United States Trust Co., 431 U.S. at 30-31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 114-115 (State failed to demonstrate that its repeal of 1962 covenant was necessary or reasonable). But that burden could be sustained by evidence in the record, even if the evidence was produced by EPF. The evidence in the record is uncontradicted.

In 1983, when Calvert County first began to act on the problem of the lack of sewer and water capacity, no additional capacity was available. That which existed had been fully allocated. The same conditions

persisted when this case came to trial. Part of the problem was that in 1981 State authorities had reduced the Prince Frederick sewage treatment plant design capacity from 170,000 gallons per day to 137,000 gallons. In any case, those who wished to obtain sewer and water allocations could not do so. So great was the demand that in 1985 the County quit adding names to the waiting list for allocations. Whether Calvert County could have foreseen these developments in 1978 is doubtful. What is not doubtful is that it was reasonable to take some action to alleviate the problem. Something had to be done to achieve orderly administration of the sewer system.

Was what Calvert County did necessary? If this case involved a contract between two private parties, we would defer to the governmental determination in this regard. Keystone Bituminous Coal Ass'n, 480 U.S. at 505, 107 S. Ct. at 1253, 94 L. Ed. 2d at 501; Energy Reserves Group, 459 U.S. at 412-413, 103 S. Ct. at 705, 74 L. Ed. 2d at 581. But we are aware that when the government itself is a party to the contract,

> complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public

> purpose, the Contract Clause would provide no protection at all.

United States Trust Co., 431 U.S. at 26, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112 [footnote omitted]. So we examine the necessity for the Calvert County policy. But while we must not be deferential to the county commissioners, neither is "strict scrutiny" required. Md. State Teachers Ass'n, 594 F. Supp. at 1361.

EPF, taking its cue from the aforegoing quotation from United States Trust Co., argues that the imposition of the user charge as an alternative to forfeiture of the allocation, was simply a method of raising money to help fund a poverty

-stricken system. We agree that government cannot justify contractual impairment "simply because it would rather spend the money for some other public purpose." Md. State Teachers Ass'n, 594 F. Supp. at 1361. But that is not what happened here.

As we have observed, the trial court record shows that water and sewer system capacity in Calvert County had been exhausted. That system, like any of its kind, was designed to accommodate a certain capacity. And, as the testimony showed, the user fees not only covered the operation of the system but also its maintenance. This was crucial, for as the testimony also showed, this

system was short of funds. if all of those with reserved allocations were using the system, it is reasonable to infer that the maintenance costs would be covered by the fees. But with only a fraction of those with reservations using the system the maintenance costs could not be met. As the Court of Special Appeals explained, "[i]f [EPF] did not use its allocation within this normal course of time, it was reasonable and necessary to require that [EPF] begin paying the minimum amount that allocation would have been expected to generate when the capacity was originally set aside." Board v. East Prince, 80 Md. App. at 87, 559 A.2d at 826. Unless the system was

being used by all those who had allocations, the funds for its maintenance would be deficient. The "use-it-or-lose-it" policy, with its user fee option, was intended to assure the integrity of the system by addressing this problem.

In addition, the lack of capacity gave the County a reason to encourage those who were not apt to use their reservations in the foreseeable future to give them up to someone who would use the allocation immediately. This would ensure the payment of user fees, as well as promote active construction projects. Counties grow, and an important governmental objective is controlling that growth appropriately

by assuring that scarce resources are available to projects, such as hospitals, schools, shopping centers, and residential communities that are ready to proceed, as contrasted with those that do not have all legal permits for completion.

The necessary prong of the analysis also involves an inquiry into whether "a less drastic modification" would have been sufficient to achieve the governmental goal. United States Trust Co., 431 U.S. at 29-30, 97 S. Ct. at 1521, 52 L. Ed. 2d at 114. "[A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." Id. at 31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115.

EPF does not help us by suggesting what lesser measures might have sufficed. If does assert that the problem might have been more readily solved had certain persons who had swapped rights-of-way for allocation been included in the "use-it-or-lose-it" policy; these persons were exempted under the 1983 resolution. This circumstance no longer exists because the 1986 resolution -- the only one in effect at the time of trial -- does not exempt them. Calvert County submits that the 1986 policy applies to everyone, and that assertion is consistent with the resolution's language. When government had made a

showing as to reasonableness and necessity commensurate with the interest impaired, we think it incumbent on the party claiming that the impairment is unconstitutional to suggest what less drastic measures might be adequate to the task at hand. See Nevada Employees Assoc. v. Keating, _____ F.2d _____, _____, (9th Cir. 1990), [1990 U.S. App. LEXIS 7997, 11 (9th Cir.)]; Md. State Teachers Ass'n, 594 F. Supp. at 1371. EPF failed to do so.

Given that the impairment here was not "drastic" or severe, we conclude that Calvert County has made a sufficient showing of reasonableness and necessity to accomplish an

important public purpose to sustain its "use-it-or-lose-it" policy. This case is closer to Burning Tree and Chevy Chase than it is to Allied Structural Steel Co. or United States Trust Co.. Calvert County's action did not unconstitutionally impair any obligation of its contract with EPF.[4]

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[4] The Court of Special Appeals observed that the Attorney General apparently had not been given notice of EPF's declaratory judgment action and certainly had not participated in it. Board v. East Prince, 80 Md. App. 78, 80 n.1, 559 A.2d 822, 822 n. 1 (1989). That court also correctly noted that Maryland Code (1989 Repl. Vol.) Section 3-405(c) of the Courts and Judicial Proceedings Article requires the Attorney General to be notified and to be given an opportunity to be heard when a declaratory judgment action alleges that a "statute, municipal or county ordinance, or franchise is ... unconstitutional." East Prince, 80 Md. App. at 80 n.1, 559 A.2d at 822 n.1. Noncompliance with Section 3-405(c) has not been raised in this

case, and the statutory requirement does not affect subject-matter jurisdiction. Gardner v. Board, ____ Md. _____, _____, _____ A.2d _____, ____ (1990) [slip op. at 12-13]. Nor need we decide whether this requirement, like the nonjurisdictional issues of exhaustion of administrative remedies and primary jurisdiction, is a matter we must address nostra sponte. Comm'n on Human Rel. v. Mass Transit, 294 Md. 225, 232, 449 A.2d 385, 388 (1982) (exhaustion of administrative remedies); Clinton v. Board of Education, 315 Md. 666, 677, n.9, 556 A.2d 273, 279 n.9 (1989) (primary jurisdiction).

While the sanction for noncompliance with Section 3-405(c) "may well be to vacate the judgment and remand for further proceedings after notice to the Attorney General," Gardner, _____ Md. at _____, _____ A.2d at _____ [slip op. at 13] there is no need to do that here, as there was no need to do so in Gardner. The purpose of Section 3-405(c) is to allow the Attorney General to "'decide whether the State, with the forces it can muster, should step in and support the enactment.'" Gardner, _____ Md. at _____, _____ A.2d at _____ [slip op. at 10] (quoting Sendak v. Debro, 264 Ind. 323, 327, 343 N.E. 2d 779, 781 (1976)). Since we have found "the enactment" of Calvert County to be

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY PETITIONER.

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constitutional, no purpose would be served by allowing the Attorney General to be heard on that issue in the trial court.